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# Public Access to Beaches in America

Michael Betty
*University of Rhode Island*

# PUBLIC ACCESS TO BEACHES IN AMERICA

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Michael Betty

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# CHAPTER 1

## INTRODUCTION

In the United States today there exists a growing, mobile population who wish to make use of what is considered to be a diminishing natural resource, the shoreline beaches. The public is denied access to the sea and the enjoyment of shore by the littoral land owner who occupies the beach area to the exclusion of all others.

It appears that the rights of the public will have to be expanded to insure adequate space and facilities for recreation. This expansion will encroach on private rights as the population seeks access to beach areas that have assumed a public character. When the situation arises, the courts will have to determine where and if the public has a legitimate right to the enjoyment of the shoreline resources.[1]

The problem of access is most distressing in areas of high population density. Millions of city dwellers, especially those of the lower economic brackets, do not have the proximity to the beach to

escape the pressures of the urban environment. Many cannot afford to travel to areas where access is not restricted and the result is a situation where literally millions of people jam a nearby public strip of sandy shore.

It is the role of governments on all levels to recognize the existence of the beach access problem and to search for meaningful solutions which best meet the needs of all constituents.

Action taken at the state level would seem to be the most appropriate course for solving the problems at hand. Local governments are often personally involved and lack a concern for those citizens who do not reside within their jurisdiction. The Federal government is perhaps too far removed from the reality of the situation and is wanting in flexibility and spontaneity in dealing with the highly emotional nature of the problem.

## CHAPTER 2

## THE LAND INVOLVED

There are two basic approaches to defining the physical area in question: the definitions of the existing legal system or the description of the natural ecosystem. Unfortunately, the legal approach does not reflect Nature. It would be desirable in the future to better represent what Nature has given America in the legislation enacted governing use.

The beach as the public knows it is broken up into a number of parts by existing law. The high water mark is a line the ocean reaches at mean high tide. The low water mark is a line the ocean reaches at mean low tide. (It takes 18.6 years to determine mean tides because of celestial influences and lengthy observations are therefore necessary to fix particular lines.) The foreshore or tidelands is the land between high and low water marks. The uplands or dry sand area is the land landward of the high water mark. The beach, generally speaking, is the land from the water's edge to the point where vegetation begins.[2]

The law as it presently exists gives the state the rights to the seabed or the area seaward of the mean low tide. The foreshore has been considered to be held in trust for the public by the sovereign, a concept technically referred to as "jus publicum." The foreshore is available for public use, even if the fee title to the foreshore is granted by the state to private owners.[3]

The area of concern is the dry sand beach landward of the high water mark when the littoral owner attempts to exclude the public which is trying to assert and maintain "a right of traditional or long accepted usage."[4] The public may not have a strictly legal right to enjoy this dry sand beach.

Access to the sea is a term used to mean a number of freedoms. It includes not only the right to travel from the shore into the sea, but also "enjoyment of the sea and its fringes in reasonable and traditional ways."[5] This would include fishing and rescue operations, as well as recreational uses. Access to the sea would thus include all the acceptable uses of the beaches as far back as man remembers.

A crucial question arises when the shoreline

owner objects to the extension of the public's use of the wet sand beach landward of the high water mark. Over the years there has been no clear distinction, as far as usage is concerned, between the foreshore and dry sand beach. For example, most of the so-called legal uses of the foreshore by the public could not take place at high tide for the simple reason that the public would be underwater at that time.

This is the dilemma faced by the courts and legislators in dealing with problems of beach access: how to reconcile the demands of an expanding recreational public with the legitimate claims of shoreline landowners.

There is a second approach which may be helpful in gaining insight into the beach access problem. It involves understanding the interdependent ecosystems of the coast as they relate to the definition of the legal parameters of ownership. If the concepts of legal ownership paralleled the natural relationship between sea and land, there would be no problem of beach access for the public. This approach has

been the basis for legislative action in Texas[6] and is embodied in proposed national legislation, the National Open Beaches Bill.[7] It has also been the basis for a recent proposal in Florida.[8]

The coastal shore is defined as the coastal land and water area composed of two dynamic systems that constitute the life processes of a natural beach. The dune system and littoral drift system are the interdependent parameters of the ecosystem. As they interact, a number of dynamic boundary lines become visible.

The open beach is the area of the shore affected by wave action from the open sea to a point affected by the highest wave not a storm wave. On most beaches this would include the entire berm.

The berm is the area of the coastal shore above water which is usually a horizontal terrace of sand brought ashore by wave action. This is the familiar part of the beach made up of the observable sand.

The beach face or plunge zone is the steeply sloping seaward side of the berm against which the waves focus their energy.

The line of vegetation is the extreme seaward boundary of natural vegetation.

The backshore is the entire area of high ground normally consisting of the dunes and berm where wave action rarely reaches. The wind, possibly of seasonal variation, is the primary force in sand movement.

The basic theory behind this approach is that the beach, specifically the berm, is not the edge of the permanent coast but part of the littoral drift system. Because this physical area is in a constant state of change due to the fluctuations of Nature, all beach areas should be subject to "a public trust or easement up to the point the highest high tide reaches the edge of the permanent coast." In effect, the berm would legally be considered as part of the sea's interaction with the shoreline at all tides and thus be considered as part of the sovereign's public trust.

Under this system, the open beach areas of the coastal shores are impressed with a state or national interest as unique, limited natural resources and the public has a right to free and unrestricted use of

them as a common to full extent consistent with the property rights of the landowner. Although the Federal and various state constitutions would still protect the landowner, the public would claim a right to use of the beach area by reason of their "traditional use as a thoroughfare, as a haven for fishermen and sea venturers, and their frequent and uninterrupted use by the general public." It can be argued that access to and use of the beach is vital to the public's health, safety, and welfare and therefore within the power of ligislatures to protect by appropriate law.

This approach on the national level since 1969 has been sponsored by Congressman Bob Eckhardt of Texas in the National Open Beach Bill:

> Sec. 202. By reason of their traditional use as a thoroughfare and haven for fishermen and sea ventures, the necessity for them to be free and open in connection with shipping, navigation, salvage, and rescue operations, as well as recreation, Congress declares and affirms that the beaches of the United States are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution.

The effect of the bill if it ever becomes law would be to clarify existing state law by placing the burden of proof on the landowner; i.e., the owner must rebut the presumption that the public has established recreational rights to the dry sandy beach.

The National Open Beaches Bill is a manifestation of the growing awareness in Washington that the present legal system concerning the use of shorelines and, indeed, all limited resources is failing to meet the needs of the American people. The law protects the landowner to such an extent that the public is being denied what is perhaps a fundamental right--the right to use and enjoy our natural resources.

The obvious shortcoming to this approach is that it is in conflict with the existing law of the land. The landowner has a history of judicial precedents to defend his claim on a particular parcel of land. It could be political suicide for many elected officials to support legislation which may in the opinion of the landowner threaten to restrict his enjoyment and personal use of his private property.

## CHAPTER 3

## THE PEOPLE

The population of America is growing and will stabilize over the next seventy years at between 250 million and 270 million, 40 to 60 million more than we have today.[9]

Census Bureau figures for 1970 show that fifty-four percent of the present population live within fifty miles of the coast, a strip of land that accounts for only eight percent of our total land area.[10]

Although these figures indicate a steady influx of people into coastal communities, there has not been a massive exodus by the inland populus to the seashore. Rather, the economic necessity of living near an industrial-employment center, combined with a general distaste for city living, has put tremendous pressures on the neighboring suburbs of major cities.[11]

Additional strain on the coast comes from the growing number of individuals who have bought second homes for recreational purposes. Others are buying shorefront property as pure investments, reasoning that the value of land has only increased in recent memory.

In the history of this country it has been the pursuit of the "good life" that has been the driving force for the economy. For some people it has been a private dream to someday live by the sea. Unfortunately, the dreams of too many Americans are not fulfilled, while others are being realized at costs beyond the dollar value of the land in question. It is the pressures of this dreaming population, reaching out to occupy at least for a few brief hours some part of the sandy shore, that has brought about the beach access problem. The situation is compounded by those individuals, whether they be private citizens or whole communities, who have the power to exclude all others from their own private American dream.

# CHAPTER 4

## THE SHORELINE

The shoreline of the United States is defined as the boundary or intersection of land and reasonably large body of water. This meeting place of physical features sets it apart from other natural resources.[12]

Two major studies on the ownership and use of the American shoreline are noteworthy. In 1962, the Outdoor Recreation Resources Review Commission made a comprehensive study based on methods developed by the Coast and Geodetic Survey.[13] (See Table 1) The totals presented in the report to the President and Congress included all measured coast that meets their criteria for recreation, whether it be bluff, wetland, or beach. A beach, according to their definition, is a wide expanse of sand or other beach material lying at the waterline and of sufficient extent to permit its development as a recreation facility without important encroachment on the upland. Of the entire American coast, only 4,350 miles meet this definition of a beach suitable for recreation.

In 1971, the United States Army Corps of Engineers completed the National Shoreline Study as authorized by Congress in 1968.[14] The criteria used by the Corps included any beach capable of erosion. (See Table 2) This does not necessarily mean that the land could support recreational activities. Also, the land could be privately owned but used by the public. It is possible in the near future for restrictions to be imposed on the public's access to these areas.

One possible conclusion from these studies is that there is physically enough shoreline to meet recreational needs. Unfortunately, the public does not have legal access to these areas in many cases because of limitations imposed by local communities or the private citizen.

TABLE 1 - ORRRC Report

| Shoreline Location | Detailed Shoreline | Recreation Shoreline | Public Recreation Shoreline | Restricted Shoreline |
|---|---|---|---|---|
| Atlantic Ocean | 28,377 | 9,961 | 336 | 283 |
| Gulf of Mexico | 17,437 | 4,319 | 121 | 134 |
| Pacific Ocean | 7,863 | 3,175 | 296 | 127 |
| Great Lakes | 5,480 | 4,269 | 456 | 57 |
| Total | 59,157 | 21,724 | 1,209 | 581 |

Note: This study excludes Alaska and Hawaii

TABLE 2 - National Shoreline Study

| Shoreline Location | Total Erodable Shoreline | Publicly Owned | Public Recreation Use |
|---|---|---|---|
| Atlantic Ocean and the Gulf of Mexico | 27,680 | 6,260 | 2,130 |
| Pacific Ocean | 4,650 | 1,240 | 790 |
| Great Lakes | 3,680 | 650 | 370 |
| Total | 36,010 | 8,150 | 3,290 |

Note: This study excludes Alaska and Hawaii

# CHAPTER 5

## LEGAL THEORY

### I. The Constitution and the Courts

It is the role of the courts and various levels of government through appropriate legislation to determine when and where the public has a legal right to use a private beach for recreation or, at least, when and where public access to the foreshore exists.

The state, however, could not compel a private property owner to allow the public to use his or her beach for recreation. This would be an unlawful exercise of the police power, constituting a taking of property without compensation.

The rights of private property ownership and the Constitutional limits to public control of those rights is a highly charged emotional issue. Although the problems of beach access can raise a number of issues under the Constitution, the clause that poses the most serious restraint is the taking clause:

> ... nor shall private property be taken for public public use without just compensation.[15]

The general principle that guides the courts in questions concerning the taking issue was established

by Justice Oliver Wendell Holmes in Pennsylvania Coal Co. v. Mahon (1922).[16] The basic legal arguements in this case centered on the regulation of land by the State without just compensation to the landowner.

Briefly, the Pennsylvania legislature passed the Kohler Act, which prohibited the mining of coal so as to cause the subsidence of any building, structure, or transportation route within the limits of a designated class of municipalities. H. J. Mahon owned property that would be effected by mining and filed a bill in equity to have mining operations beneath his property permanently enjoined based on the Kohler Act. Mahon admitted that the Company had the rights to the minerals under his property, but alleged that the regulations passed by the State made mining on his property illegal. The Company objected to this legislation on the grounds that first, it impaired the obligation of contracts in violation of Article I, Section 10 of the Federal Constitution, and, second, it took the property of the Company without due process of law.[17]

Justice Holmes ignored the former premise and concentrated on the taking issue, questioning whether the Kohler Act tried to accomplish through police power regulation what could only be accomplished by eminent domain. Justice Holmes viewed the difference between taking and regulation one of degree, not kind. He ruled the Kohler Act went beyond the constitutional power of the Pennsylvania Assembly and that,

> the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

The particular circumstances and facts involved in future cases are the determining factors in reaching a decision. This in effect means that a balancing test between the rights of the individual landowner and the public takes place based on unique facts of each case.

It should be noted that similar protection is afforded the landowner in state constitutions.

In dealing with beach access the public is not without protection under the law. It is guarded by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

> No state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the law.[18]

This protection has been most effective when applied to statutory distinctions by municipalities between residents and non-residents. The state has taken the lead in determining the rights of its citizens.

The state has a number of legal tools and techniques at its disposal once the decision has been made to seek public access to the shore and to provide recreational activities for its residents. All approaches will have to avoid the taking issue, although direct purchase is one solution that should be considered in lieu of the courts.

Frequently, state legislation and court cases involving beach access are based on title theories which hold that the shoreline landowner has never had, or has relinquished, his rights to the property. In general, the rights of the public based on common law doctrines are weighted against the rights and reasonable expectations of the landowner, whether they be public or private entities.

II. Public Access to Privately Owned Beaches

A. Dedication

Dedication is defined as an intentional donation of land by the owner to the general public for public use. It is expressed by oral declaration, by a deed or note, or implied when there is acquiescence by the owner in public use. All dedications require an intent on the part of the owner and acceptance on the part of the public by using the land.[19]

The first application of implied dedication to a beach access case came in a 1964 Texas lower court decision, Seaway Co. v. Attorney General.[20] Acting under a state statute which prohibited the obstruction of access to state owned tidelands or beaches in which the general public had acquired easements or rights as users, the Attorney General fought to protect the citizen's right to use of and access to a limited natural resource.

Prior to Seaway, beach access cases were generally unsuccessful because the public as represented by the state could not overcome a presumption that the owner had permitted public access or use based on an implied revocable license. This presumption was first

reversed for public roadways, because of their definite character, frequent use and public importance.[21]

In Seaway, the court applied the same roadway precedents to beaches in seeking to remove three barriers erected by the Company which extended from the vegetation line down past the line of mean high tide, thus excluding the public from the dry sand beach. For at least a century before Seaway built the fences in 1958, the general public had enjoyed free and full use of the beach without seeking permission and without interference from the titleholder. The court held that these facts demonstrated an implied common law dedication of an easement in the area between the vegetation line and mean high tide.

The details of the case made it that much easier to extend the roadway precedents to beach access. The beaches in Texas had been used in the past as a public highway, post road and stagecoach route. The state had maintained the beach in much the same way as it would a highway. But the court specifically included in its decision a variety of recreational

uses as establishing the dedication. In addition, the court emphasized the public nature of the easement, pointing out that only the public may acquire an easement by dedication, as opposed to a prescriptive easement which may be acquired by anyone.[22]

It should be noted that the Seaway case was litigated in the context of the Texas Open Beaches Act.[23] The court made little application of the Act, using only the statute for the expressed authority which it provides for the Attorney General to bring the case to court and for definitions of "beach" and "line of vegetation."

Two California cases illustrate the public's rights to beach access not by public use, but by long, continuous, adverse use. The facts and issues were similiar in both cases.[24]

In Gion v. City of Santa Cruz,[25] Gion owned beach property which the public had used since 1900 for recreational purposes. After 1941, the City of Santa Cruz took an active interest in improving and maintaining the land for public use. Occasional signs indicated that the property was privately owned, but they

quickly blew away. The lower court found fee title in Gion subject to a general recreational easement in the public and the California Supreme Court affirmed this decision.

In Dietz v. King,[26] Dietz brought a class action suit on behalf of the public to prevent King from blocking a dirt road leading to a small beach, Navarro Beach in Mendocino County. Public use of the road had gone back one hundred years. The previous owners of the area in question testified they had encouraged public use of the road and beach. The Mendocino County Court ruled there had been no dedication and that widespread public use does not lead to an implied dedication. The California Supreme Court reversed this ruling, holding that a common law dedication had taken place as a matter of law, including both the road and the beach.

These two rulings gave a specific meaning to the word "adverse" in the context of implied dedication: use is adverse when the public used the land for the prescriptive period (five years in California) as they would use a public recreation area; i.e., the

general public believed they had the right to enter the land without asking permission and used the land under a claim of right.[27]

Shorefront owners in California, in order to deny public access, must now show that they granted a license to the public to use the land in question, or show they have made bona fide attempts to prevent public use. This has resulted in some areas in private owners closing off beach areas.

Although the California Supreme Court rejected in the two cases the presumption that public use is under a revocable license, the fee owner may now under the California Civil Code[28] record an instrument that declares any use of his land by the public is permissive and with license. This legislative action encourages the private landowner to allow public use of his beach property without the danger of this use ripening into a prescriptive easement.

B. Customary Rights

The English doctrine of custom has its basis in the belief that prolonged usage over time must have been founded on a legal right originally

conferred in the distant past, and shall be recognized and enforced even though never formally recorded.[29]

There are seven requisites of custom that must be established from the evidence of the case in order for custom to be recognized as law: ancient, exercised without interruption, peaceful and free from dispute, reasonable, certain and defined boundaries, obligatory on landowners, and not repugnant to or inconsistent with laws or other customs.[30]

Custom was the basis for court action in the 1969 Oregon case, State ex rel. Thorton v. Hay,[31] establishing that the general public had acquired a recreational easement in all beach areas of the Oregon coast.

The decision is based on a conflict between the rights of the public and the titleholder of beachfront property in Cannon Beach, Oregon. William and Georgianna Hay in 1966 attempted to assert their property rights by enclosing the dry sand area of the beach behind their motel for the exclusive use of their patrons. In a landmark decision, the Oregon Supreme Court used a theory of customary rights to confirm the public's rights in all the state's beaches.

The court held that the requisites of custom did exist in this particular case.[32]

The use of custom in similar cases in the future will face three main problems. First, there have been very few state decisions based on custom in the past; only Oregon and New Hampshire have jurisdictions holding that an easement can be established by the English doctrine of custom. Second, custom was applied by the Oregon courts to the coastal areas held specifically "sui generis"; any wider applications will be countered with the argument that there were unique facts and circumstances involved in the Oregon case.[33] Third, proving a public usage uninterrupted since the dawn of an area's political history is much more difficult than proving adverse public use for a prescriptive period; many states with long histories of intense private ownership and development may find proving immemorial usage a difficult if not impossible task.

There is one distinct advantage to the use of custom as presented in the Oregon case as a basis for establishing beach access for the public in other states: it avoids determinations of prescriptive

easements on a tract by tract basis, as one case can open the entire coastline to the public.[34] The doctrine of custom, as applied to State ex rel. Thorton v. Hay, expanded the English doctrine of customary law to include a much larger geographic area. Originally, the doctrine applied only to a limited locality or certain classes of people.

## III. Public Beaches Which Are Restricted To Residents Only

### A. The Public Trust Doctrine(Jus Publicum)

The public trust doctrine is based on the principle that certain lands, in particular the foreshores, are owned and administered by the state or municipal government as trustee on behalf of the public. The governing of these lands must therefore serve the interest of the entire public, not some limited segment of it.[35]

Those who wish to guarantee public access to beach areas have used this doctrine effectively against municipalities which attempt to restrict use to local residents or to charge discriminatory user fees to nonresidents.

In Gewirtz v. City of Long Beach,[36] the lower-court decision was founded on a theory of irrevocable dedication of a parklike beach to public use. The City of Long Beach had acquired title to the dry sandy beach which formed its oceanfront property between 1935 and 1937 by grants and conveyances. The municipality created Ocean Beach Park which it operated, maintained, and supervised as a public beach, requiring

a payment of a nominal fee for entrance. In 1971, a local law embodying the intent of an earlier ordinance was passed which restricted the use of the beach to residents and their invited guests.[37]

The court found that there had been an expressed intent to dedicate, manifested by the official actions of the city in administering the beach as a public park. Acceptance by the public was shown to exist by (1) the maintenance and improvement of the area by the municipal corporation which is the representative of the people, and (2) the continuous public use of the beach for over eighty years. The court further ruled that it was beyond the power of the city government to revoke the dedication and restrict use to residents only, since dedication is always made to the public at large. The municipality had by its actions over time put itself in the position of holding the property subject to a public trust for the benefit of the general public.[38]

In Borough of Neptune City v. Borough of Avon-by-the-Sea,[39] the issue centered on the alleged right of Avon, based on a New Jersey statute[40] to charge discriminatory user fees to nonresidents for entrance

to the beach. Until 1970, Avon's fee-prescribing ordinance did not distinguish between residents of the town and nonresidents. In the summer season of 1970, fee increases in effect doubled the seasonal rate of nonresidents from $10.00 to $20.00 and substantially increased the daily rate from $1.00 and $1.25 to $1.50 and $2.25. The state statute allowing for such fees was challenged by the inland, adjacent municipality of Borough of Neptune City and two of its residents.

The Borough of Avon-by-the-Sea argued that it had incurred an annual deficit of $50,000.00 as a result of admitting the nonresidents. It conceded that the beach had been dedicated to the public and that there was no basis for totally excluding nonresidents. The sole question was whether or not Avon could charge nonresidents a higher fee than residents.[41]

The Borough of Neptune City argued that the differential fees were invalid as arbitrary and invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment and

that the differential fees in effect abolished the common law right of public access to the ocean.[42]

The Supreme Court of New Jersey did not address itself to the equal protection question, but rested its decision on the modern meaning and application of the doctrine of public trust. It stated that the statute enabling municipalities to charge beach user fees was a delegation of the police power of the state. The state, therefore, had an interest in and responsibility for this oceanfront property.

The public trust doctrine as viewed by the Supreme Court of New Jersey proscribes alienation of state-owned, tide-flowed lands which would be detrimental to the public interest and dictates the uses of land to which the public is entitled. Beach activities are within the class of protected public uses under the public trust doctrine, including the right of bathing and recreation.[43] Since the trust lands are held by the state for the benefit of the public at large on an equal basis, municipalities as political subdivisions of the state may not discriminate in any respect between residents and nonresidents.

This decision implies that in New Jersey the public has the same public trust rights in the city-owned dry sand area above mean high tide as it has in the foreshore.[44]

B. Conclusion

The individual state has a number of judicial approaches to choose from in securing the public's right of access to beaches. The circumstances involved in each state will direct the legal process. The real question involved is not which legal theory to choose, but whether the state has the will and wisdom to make the decision to act on behalf of the general public. It is the political consequences of this decision to act that poses the greatest problem for local, state and national leaders.

# CHAPTER 6

## PROCEDURAL METHODS

Seeking a judicial remedy to problems of beach access may not meet the requirements of the situation at hand. The state may find alternative means more effective than the courts in providing for its citizens.

There are several basic tools which can be utilized for securing beach areas for public recreation: buy the land, either through purchase or condemnation of the fee simple or an easement;[45] regulation based on the exercise of the police power; or taxation methods.

### I. Acquisition Through Purchase and Condemnation

Voluntary or negotiated purchase of either partial or complete title is a direct method for the state to avoid the taking issue in the courts. The state acknowledges that a taking will occur in the name of the people and negotiates with the owner for a voluntary surrender of the partial or complete title for some mutually agreeable sum of money. This transaction is not substantially different from a sale of land between individuals.

Condemnation by eminent domain involves the seizure of title through compulsory proceeding where the owner is forced to sell the land to the government. The government, however, must pay the fair market value of the land; i.e., at its highest value and best use normally considered by a purchaser. The owner would not be entitled to any compensation for any additional increase in the value of the property due to the state wanting to purchase it. Nor is the owner due any relocation costs, profits, or business opportunity lost by displacement.[46]

In the acquisition of an easement development or recreation rights in property at less than fee simple, the government pays the landowner the value of whatever property rights are relinguished. This method is less expensive than purchase of the entire property and has the added political advantage of not making the rights of the recreational public mutually exclusive of the rights of the private landowner.

The only problem with these procedures is that

it can cost the government a great deal of money. There are two good federal plans which feature cost sharing and grants to encourage state and local pursuit of national objectives:

(1) The Land and Water Conservation Fund under the Bureau of Outdoor Recreation has as its major purpose enhancing outdoor recreational opportunities, particularly in urban areas. It has minimal funding annually of $300 million through 1989. It can provide 50% of the monies needed in a matching fund agreement with the state.

(2) The Open Spaces Program under the A-95 Review Program (Title VII of the Housing Act of 1961, amended by Title IV of the Housing and Urban Development Act of 1970) can provide matching funds with the state for the cost of acquisition and development of lands in urban areas for permanent open space use, including recreation.[48]

II. Regulation Based on the Police Power

The police power of the state is its authority

to regulate the activities of its citizens to promote public health, safety, morals, and the general welfare.[49] In dealing with beach access, this exercise is usually in form of zoning and building codes.

Several conditions must be met for the exercise of police power to be legal:

1. The legislative body or authorized government agency must find a need for the exercise and must specify the required restrictions in detail.
2. The need must be related to the health, safety, morals, and general welfare of the community.
3. Restrictions must not be arbitrary or unreasonable.

The Fourteenth Amendment of the Constitution can still protect the landowner. However, the theory behind police power is based in a belief that some individual rights in property can be restricted in behalf of the general welfare, as long as the method of regulation is proper and reasonable within the meaning of due process. Its greatest advantage is that it allows the regulation of private property

without the expenditure of public funds for compensation.[50]

III. Taxation Methods

Taxation techniques can be used alone for compensating landowners for reduced property values when the land is used by the public. The particular method used can also be combined with other approaches to secure a particular objective.

A nonuniform tax assessment of property value could be used for allowing access across private property, provided a public purpose can be demonstrated and equal protection is guaranteed. This could take a number of forms: reduction in fair market value, limited and unlimited deferral, or in-lieu payment.[51]

IV. Existing Legislation

Several steps have already been taken by state and federal legislatures to provide for public access.

Representative Bob Eckhardt, co-author of the National Open Beaches Bill currently pending in Congress, was the original author of the Texas Open Beaches Act. Passed by the Texas Legislature in 1959, it provides for public access rights to state-owned

beaches. It contains two basic provisions: the area seaward of the vegetation line is presumed to be subject to the public use and such prima facie presumption can only be rebutted by the landowner demonstrating the right to exclude persons from the public beach.[52] These same features are contained in the National Open Beaches Bill.

Delaware has enacted legislation to protect public access by limiting liability of landowners who make their land and water areas available to the public.[53] This approach could be helpful in areas where private development dominates the coastline.

A unique program in Rhode Island is underway to determine where and if the public has a right of access to the seashore. The Public Rights of Way Commission was established by law to avoid courtroom battles by defining those areas where the public clearly has a right of access based on past use.

The most promising development in meeting the challenge of resource use in the future can be found on the national level in the Coastal Zone Management Act, administered by the National Oceanic and Atmospheric

Administration.[54] The Act provides for 2/3 federal 1/3 state matching giants for a comprehensive approach to resource allocation in the coastal zone, including the development of policies, criteria, standards, methods, and processes for dealing with land and water use decisions. Beach access is clearly a problem that falls within the scope of the Act. The determination by the state of how it wishes to deal with the problem will complement the guidelines provided by the federal government and funding could then be allocated for a spectrum of solutions.

# CHAPTER 7

## CONCLUSION

There has been concern for the rights of all the people running throughout the history of the United States. Until recently, one would point to the private sector as being the driving force in the development of the American frontier. But the frontier days are now over and the natural resources of this country do not need industry's uncontrolled development but management by those elected to serve in the people's name.

The problem of beach access is one of many found in the coastal zone. The solution may already exist in the laws and legislation that govern us. This presentation was a statement of the legal and procedural solutions already applied in different areas of the American shoreline.

FOOTNOTES

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1 Texas, Leg., Report of the Interim Beach Study Committee, Footprints on the Sands of Time. 61st. Leg., 1970, pp. 14-15.

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2 Comment, "Public Access to Beaches: Common Law Doctrines and Constitutional Challenges, 48 N. Y. U. L. R. 369, at 370 (1973).

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3 Eckhardt, "A Rational National Policy on Public Use of the Beaches," 24 Syra. L. R. 967, at 972 (1973).

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4 Id., at 970.

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5 Id., at 971.

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